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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1993

Conrad John Husman, Petitioner

vs.

CLIMAX MOLYBDENUM COMPANY,
a Delaware corporation,
CLIMAX NON-CONTRIBUTORY
RETIREMENT INCOME PLAN,
BARBARA RANDALL,
Administrator, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FREDERICK W. NEWALL
730 N. WEBER SUITE 101
COLORADO SPRINGS, CO 80903
(719) 633-5211

11 6 pp

QUESTION PRESENTED

If a pension plan grants the administrator the discretion to both interpret the plan and to prescribe procedures for the filing of applications for pension disability retirement benefits, may she set application standards, disability prerequisites and other procedures which differ from the plain language of the pension plan and which unreasonably restrict application for plan benefits?

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PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner, Conrad John Husman,

respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit refusing to find that the District Court's opinion which granted summary judgment for the Respondent and upholding a judgment which found that the plan administrator's ruling refusing to grant Petitioner the full measure of his disability pension benefits was not arbitrary, capricious, unreasonable, or in bad faith.

OPINIONS BELOW

The opinion of the Court of Appeals appears in Appendix A to this Petition. The written opinion of the District Court in and for the State of

Colorado appears in Appendix B of this Petition.

JURISDICTION

The Court of Appeals, Order and Judgment in this matter was filed on June 8, 1993. This Court's jurisdiction is sought under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. §1132(a)(1)(B), 29 U.S.C. §1104(a)(D) and 29 U.S.C. §1133 are set forth in Appendix C.

STATEMENT OF THE CASE

The United States District Court,

State of Colorado, had jurisdiction pursuant to 29 U.S.C. §1132(e)(1).

On December 7, 1989, Petitioner filed a Complaint asking for relief under the Employee Retirement Income Security Act (ERISA) 29 U.S.C. §1001 et seq.

Petitioner worked fifteen years in the Climax Mines until 1977 when his back gave out.[1] He was then placed on a medical leave of absence without benefits. He filed a 1977 grievance which included the Climax benefits department asking he either be returned to work or granted medical retirement. Under the grievance he

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[1] See the November 30, 1984 report of Mr. Husman's treating physician Robert S. Young, II, M.D. setting forth his orthopaedic problems (Appendix D), which report was submitted with his 1986 Metropolitan application.

asked to "receive benefits due him and be made whole in every way." In response, Climax company stated "The company may be liable for some benefits. The Company has not and cannot make payment of benefits until Mr. Husman establishes his entitlement to contractually guaranteed benefits. Mr. Husman has failed to do this". In 1979, an Arbitrator stated in pertinent part as follows:

> The Union asserts that the Employer was obligated to submit to the company's insurance carrier on behalf of the Grievant, an application/recommendation for medical retirement. Dr. Smith (Climax Medical Director) testified that he had considered the possibility of making such a recommendation but could not do so because he could not cite a medically definable situation as a basis

> for medical retirement. He testified further that without a favorable recommendation from him, he saw no possibility that the insurance carrier would consider granting medical retirement benefits. I believe that Dr. Smith's decision was in good faith and assuming it is in accord with the insuring agreement, the text of which is not in evidence, I find no basis for setting it aside.

Respondent Climax Molybdenum Company, (Climax) and the Oil, Chemical and Atomic Worker's International Union, AFL-CIO (Union) had entered into a "Climax Non-Contributory Retirement Income Plan" (Plan), among which benefits for vested participants like Mr. Husman,

were disability retirement benefits.[2]

Climax used Metropolitan to administer disability claims. Petitioner claims he should be entitled to receive Plan disability benefits from the date of his disability, to wit : his last day of work, April 28, 1977, not from the onset date actually granted by the Plan administrator of October 30, 1986, the date chosen because it was the date an April, 1986 application for a separate group insurance benefit administered by Metropolitan Insurance Company, (Metropolitan), was received by Metropolitan.

This separate five-year "total

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[2] Entitled "total and permanent disability", defined as follows: A physical or mental condition...which permanently prevents the Employee from engaging in any regular employment with the Company or in any other regular gainful occupation...(Exhibit E).

and permanent disability" (T&P) benefit paid through and administered by Metropolitan defined commencement of benefits and disability differently from the terms under the Plan.[3]

The Respondents' Motion for Summary Judgment was granted and upheld in the Court of Appeals. The District Court held that the Plan Administrator's custom of determining when Plan disability benefits were payable - when Metropolitan granted its benefits - was reasonable, although Plan benefits are payable

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[3] The Metropolitan benefit defined "totally and permanently disabled" as follows: Three months after receipt by the Insurance Company, of due proof that the Employee...has become totally and permanently disabled..so as to be prevented thereby from engaging in any occupation or performing any work for compensation or profit, the Insurance Company will commence to pay...

when an employee can no longer engage in any regular gainful employment and Metropolitan benefits are payable when he cannot perform any work for compensation or profit. Respondents convinced the Courts below that it was a reasonable interpretation of the Plan language to grant Plan disability retirement benefits only after an application was received and granted for Metropolitan benefits, but that Husman did not "apply" for Plan benefits when he demanded "medical retirement" in his 1977 grievance.

The Plan gave its administrator the discretion to interpret the provisions of the Plan, to prescribe procedures for filing applications for benefits and to determine eligibility

for benefits.[4]

The crux of the case is therefore whether or not the administrator's power to prescribe procedures and pre-requisites for qualification of benefits allows her to require conditions for application and set other disability standards which differ from the Plan language.

Petitioner Husman received, according to contract, the following disability benefits: In 1980, an Arbitrator granted him the Metropolitan 52 week accident and sickness benefits, retroactive to 1977.[5] In January, 1985, an Administrative Law Judge of the Social

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[4] See "Administration of the Plan", Appendix E.

[5] Benefits awarded were $105.00 per week, total payment was $5,460.00 less.

Security Administration found Husman disabled within the definition of the Social Security Act since April 29, 1977. In April, 1986, Husman received worker's compensation benefits beginning June, 1983. Husman was placed on a separate company non-total disability benefit from 1981-1986. Climax finally sent Husman an application for Metropolitan total and permanent benefits in the Spring of 1986. This T&P application Husman completed and returned to Climax on April 25, 1986. Climax forwarded same to Metropolitan on October 30, 1986.

Petitioner's position is therefore that once he made a claim for medical retirement benefits, although the company's refusal to offer an application to him was upheld by an arbitrator, the administrator

could not reasonably limit the retroactivity of Plan benefits to the date Metropolitan granted benefits on the grounds that he had not earlier applied. Instead, Randall should have awarded Plan benefits as of the date Husman became disabled according to its terms. After the Plan Administrator sent Counsel letters[6], Counsel then requested a hearing. Ms. Randall denied it as follows:

Q: Did you ever receive a request for hearing in this matter from Mr. Husman or myself?

RANDALL: From you.

Q: Was that request for hearing under the pension plan

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[6] Appendix H

agreement, to your knowledge?

RANDALL: ERISA has rights.

Q: Isn't there a provision in the supplemental agreement that provides that if someone doesn't - has a disagreement with your administrative decision under the pension disability plan portion of it, that they can request a hearing from you?

RANDALL: Yes. However, at the time I don't think it was a determination as to whether it was going to be a pension disability hearing or a T&P hearing.

Q: Did you grant a hearing?

RANDALL: No.

To understand this case, it is necessary to set forth the Administrator's prerequisites for Plan disability benefits.

The Plan Administrator testified that she used following procedure to determine disability retirement eligibility under the terms of the Plan:

1. A member had to be on the Metropolitan accident and sickness program for 52 weeks in order to apply for the Metropolitan T&P Benefits.[7]

[7] In 1977, Husman was not allowed to receive the first prerequisite for pension Plan disability because he was receiving worker's compensation benefits. Then there was a dispute as to an offset Climax claimed he owed for past advances.

2. An application for Metropolitan total and permanent (T&P) benefits would be sent to the member.

3. Once Metropolitan granted T&P benefits, a document entitled "Request for Payment Information", (defining terms of payment), would be sent to the member.[8]

4. Once the "Request for Payment Information" was received, an "Application for Retirement and Election of Benefits" is sent to the member.

Plan Administrator Barbara Randall testified as follows:

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[8] A dispute as to when payments would commence was settled by Stipulation in the District Court without prejudice to this claim.

Q: Are you aware of any request by Mr. Husman to Ms. Bogunovich, based upon your review of the file, that would indicate that Mr. Husman in 1986 made an application for pension retirement benefits as opposed to a T&P benefit?

RANDALL: Not that I can remember.

Q: Do you want to add to that question based upon the consultation with your attorney?

RANDALL: The T&P application made with the insurance company is used to determine when a disability retirement would be in effect.

Q: I'm not sure that's

responsive to the question that I asked you, but as I understand, and correct me if I'm wrong - as I understand your prior testimony, you testified that in order to apply for disability pension benefits, Exhibit 3, (entitled "Application for Retirement and Election of Benefits"), claimant would first have to fill out an Exhibit 4 ("Request for Payment Information"). Is that a correct statement of what you testified to?

RANDALL: Yes, after I received the determination from Metropolitan or the life insurance company that they

awarded a T&P disability.

Q: All right. Well, first they have to determine that a worker - an ex-worker is qualified for T&P before you do anything; is that a fair statement?

RANDALL: Yes.

Q: All right. Then, you ask for more information before you take an application for the pension disability benefits; is that a fair statement?

RANDALL: We would ask for a request for payment information for the employee to fill out, yes.

Q: And after you would get the payment information of Exhibit 4, then you would

send to the applicant an Exhibit 3 to apply for disability retirement pension benefits under the pension plan; isn't that correct?

RANDALL: Yes.

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Q: That is the procedure you just described as far as first someone applies from Exhibit 1, (a Metropolitan form entitled "Statement of Claim for Total and Permanent Disability Benefits"), you hear back from Metropolitan, you send an Exhibit 4, and then you supply an Exhibit 3; is that the procedure? (Discussion off the record between the

deponent and her counsel.)

RANDALL: Before Exhibits 1, 2, 3, and 4 are applicable, you must be on what we call the company accident and sickness program for 52 weeks to even be eligible to apply.

Q: Is someone who is - has been on the accident and sickness program for 52 weeks eligible to apply for a T&P?

RANDALL: Yes.

Q: And would that person normally have to come to the benefits office to get an application, or would one ordinarily be sent to him?

RANDALL: What application are you talking of?

Q: Exhibit 1.

RANDALL: Exhibit 1, yes.

Q: What's the answer? Would you have to go to the office or would one be sent to him at some point in time during the 52 weeks of accident, sickness? Would it be sent to him or would he come to get it?

RANDALL: It would be sent to him.

Q: Is there a procedure to determine whether someone is eligible under the accident, sickness?

RANDALL: Yes.

Q: And that has its own procedure, correct?

RANDALL: Yes.

Q: And does it require - and tell me if this is accurate or not: Does it require a

determination whether somebody can return to work or not?

RANDALL: Yes.

Q: And if somebody can't return to work, for what period of time are they given an accident, sickness form ordinarily?

RANDALL: The first day - well, I can't say the first day. Accident and sickness, under the present plan you would have to miss five days of work before the time would start.

Q: Do you know if your office, and in reviewing your industrial relations administrator records, if your office sent Mr. Husman

an Exhibit 1?

RANDALL: It's hard to say. I wasn't there, so I don't know.

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Q: That's what we are talking about in this case. Is there anything in that language that states that you can't determine retroactively?

RANDALL: First of all, you have to apply for the benefit.

Q: Did Mr. Husman apply for the benefit?

RANDALL: Which benefit are we talking about?

Q: Did he apply for pension-retirement pension disability benefits under

the pension plan?

RANDALL: I sent him the Exhibit 4 in October of '87. No, he did not apply.

Q: Did you make a determination that he was entitled to it nevertheless?

RANDALL: Entitled to what?

Q: We are talking pension benefits. We are talking disability retirement under the pension plan now.

RANDALL: Yes, I made a determination he was entitled to it.

The eligibility for Plan disability retirement benefits are set out in Appendix E, which states the benefits are calculated "as of the date he becomes permanently and

totally disabled".[9]

All Plan retirement benefits other than disability retirement benefits are payable to an eligible member but not "prior to the date proper application therefore is received by the Administrator", whereas disability retirement benefits are payable to he or she "who has applied therefor, commencing as of the first day of the month after a determination of his Total and Permanent Disability has been made by the Administrator...".[10] There is no

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[9] Climax sought to change the Plan in March, 1981 (Appendix G) prior to April, 1981, when Husman was "terminated for medical reasons", but Union representative Ralph Miller testified no change took place at that time. This modification addressed a company non-total disability benefit awarded Husman in 1981.

[10] See Appendix E.

definition of "apply" within the Plan.[11] The Respondents argued below that "the same application form is used by Climax to apply for disability retirement and total disability insurance benefits".[12]

Barbara Randall, the Plan administrator, testified at deposition as follows:

Q: You would begin - ordinarily wouldn't it be - wouldn't it sum up your policy to say that you begin your benefits when Metropolitan begins their benefits; is that more clear way to say it?

RANDALL: Are you asking would I begin

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[11] See Appendix E.

[12] "Defendant's Memorandum Brief in Support of Motion for Summary Judgment" p. 3.

the employee's disability pension benefit whenever Metropolitan began the T&P benefit?

Q: Correct.

RANDALL: Yes.

Q: And that would not necessarily be retroactive from the date that Metropolitan makes their decision?

RANDALL: Not always, no.

Petitioner argued before the District Court and the Tenth Circuit Court of Appeals that the Plan Administrator had acted arbitrarily, capriciously, unreasonably, was not substantially justified, and in bad faith.

The Tenth Circuit found that

Husman had not applied for benefits until April, 1986, and Randall's selection of October, 1986 as the effective date of eligibility because it was the date upon which Husman became eligible for Metropolitan disability benefits, was reasonable.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following reasons: This Petitioner presents an issue discussed by this Court, but not specifically decided by the Court and the Opinion below conflicts with the prior ruling of this Court in Firestone Tire and Rubber Company v. Bruch, 489 US 101, 103, LEd 2480, 109 S Ct 948(1989) and with the purpose of ERISA.

The rulings below are repugnant

to the purpose of ERISA "to protect contractually defined benefits." Bruch, supra, at 489 US 113 citing Massachusetts Mutual Life Ins. Co. v. Russell, 473 US at 148, 87 L Ed 2d 96, 105 S Ct 3085. The Plan Administrator's procedure in this case operated to deny, delay and revise Husman's contractually defined disability retirement benefits under the Plan.

This Court stated in Bruch the following:

> A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable.

Firestone Tire & Rubber Co. v. Bruch, 489 US at 111. This Court in Bruch, did not, however, specifically state the standard

administrative procedure of a plan, as opposed to its interpretation. Can an administrator who has the power to establish procedures for benefit qualification, as here, set up unwritten rules separate and apart from the plan language to establish her own application and qualification standards?[13] 29 U.S.C. §1104. The fiduciary must, however, discharge his duties "in accordance with the documents and instruments governing the plan". 29 U.S.C. §1104(a)(D).

It was held below that the administrator acted reasonably in basing her decision upon the Metropolitan determination. There is,

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[13] Justice Brennan reasoned that the cornerstone of an ERISA plan was "a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits". Fort Halifax Publishing Co. v. Coyne, 482 US 1, 9, 96 LEd 2d 1, 10, 107 S Ct 2211 (1987).

however, a three-month waiting period (and perhaps more) before those benefits could be awarded after application, but no such limitation of Plan disability benefits. The definitions of disability differ. Admittedly, the administrator had to make a determination of disability,[14] but it was not reasonable for her to do so using different standards, and by Respondents' delaying applications for other benefits deemed preconditions for Plan disability retirement benefits.[15]

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[14] Petitioner argued below that it was unreasonable for Randall to delegate that duty to Metropolitan.

[15] See Appendix F. February 17, 1977 memo from Climax Benefits Coordinator Carolyn M. Forscher states "we do not accept any claims while you are receiving other compensation", indicating the difficulty Husman had applying for accident and sickness benefits, the granting and receipt for one year of which was considered by

A wrong interpretation of the Plan, although consistent,[16] can be considered arbitrary and capricious Dennard v. Richards Group, Inc., 681 F.2d 306, 314 (CA5 1982). Contra: Bayles v. Central States, Southeast, Etc., 602 F.2d 97, 100 (CA5 1979).

The Administrator denied Husman retroactive benefits prior to October, 1986 because he had not allegedly

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Respondents a prerequisite for Metropolitan T&P benefits the granting of which the administrator considered a precondition and an application for Plan pension disability benefits. See Music v. Western Con. of Team. Pen. Trust Fund, 660 F.2d 400 (CA9 1981), vacated and remanded, 459 US 810, 74 LEd 2d 48, 103 S Ct 35, 712 F.2d 413, 419 (CA9 1983), but see Gaines v. Amalgamated Ins. Fund, 755 F.2d 288, 290 (CA3 1985).

[16] Respondents argued below that some eighty-four applicants from 1972-1988 were subject to Plan approval by either the Metropolitan policy herein or a similar Connecticut General policy "Defendant's Memorandum Brief in Support of Motion for Summary Judgment", Exhibit K thereto. The Plan was established in 1958.

applied for them sooner. Her admitted policy was to construe an application for Metropolitan benefits as an application for Plan benefits.[17] The written application for Metropolitan T&P benefits was actually received by Climax on April 25, 1986. Once Husman made his 1977 written demand for T&P benefits or medical retirement benefits, Randall could not reasonably claim Husman had not applied for Plan benefits even under her own construction of the Plan.[18] There is no definition of "apply" within the Plan. Randall's position linking applying for Plan benefits to a prior application for Metropolitan benefits

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[17] See her deposition testimony hereinabove.

[18] Respondents stipulated that for purposes of Summary Judgment, Husman was disabled, within the meaning of the Plan, from April 28, 1977.

Climax refused to send Husman and later restricting plan benefits because he did not earlier apply is arbitrary Reiherzer v. Shannon, 581 F.2d 1266, 1272 (CA7 1978) (no definition of "self-employed").

The Tenth Circuit decision at bar conflicts with the Tenth Circuit's holding in Torix v. Ball Corp., 862 F.2d 1428, 1431 (CA10 1988) and Helms v. Monsanto Co., 728 F.2d 1416, 1420 (CA11 1984), which circuit cases struck down substantially identical language of the Metropolitan disability policy Randall used to determine Plan eligibility in this case.[19] Following this Court's ruling

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[19] "The standard to be applied will require the claimant to establish a physical inability to follow any occupation from which he can earn a reasonably substantial income rising to the dignity of an income or livelihood..." Torix, supra at 1431.

in Bruch, the Tenth Circuit apparent abandonment of the dignity standard of disability, is another reason to clarify Bruch.

The holdings below are further contrary to other circuit courts' rulings that refuse to acknowledge oral or unilateral modifications of pension plans, present in this case, Rodriguez v. Meba Pension Trust, 872 F.2d 69 (CA4 1989), Straub v. Western Union Telegraph Company, 851 F.2d 1262, 1265 (CA10 1988), or that shift the burden to the administrator, Music, supra.

Given Climax's refusal to give Husman an application for medical retirement, and given Climax's September 30, 1986 termination of the Plan which gave Climax a reversion of over eleven million dollars, the

holding below refused to address the issue of the neutrality of Climax employee Randall, although bad faith was alleged VanBoxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1051 (CA7 1987), Newell v. Prudential Ins. Co. of America, 904 F.2d 644, 651 (CA11 1990), Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1154 (CA9 1986). Should this Court find that Randall's interpretation of "apply for benefits" was a factual determination subject to a different standard of review, the holding below would conflict with Luby v. Teamsters Health, Welfare & Pension Trust Funds, 944 F.2d 1176 (CA3 1991) and Reinking v. Philadelphia American Life Insurance Co., 910 F.2d 1210 (CA4 1990)(de novo standard of review), contra: Pierre v. Connecticut General

Life Insur. Co., 932 F2d 1552 (CA5 1991)(abuse of discretion standard).

Finally, Randall failed to follow the claims procedure of 29 U.S.C. §1133 and 29 C.F.R. §2560.503(1)(f) which afford a participant "a full and fair review", by denying Husman a hearing, and by providing "adequate notice" 29 U.S.C.§1133. See Blau v. Del Monte Corp., 748 F.2d 1348, 1354 (CA9, 1984) cited in Holland v. Burlington Industries, Inc., 772 F.2d 1140, 1149, 1150 (CA4 1985), Wolfe v. J.C.Penney Co., 710 F.2d 388, 393 (CA7 1983) cited in Brown v. Ampco-Pittsburgh Corp., 876 F.2d 546, 550 (CA6 1989), Sage v. Automation, Inc. Pension Plan & Trust, 845 F.2d 885, 895 (CA10 1988) (prejudice must be shown), Sandoval v. Aetna Life and Cas. Ins. Co., 967 F.2d 377, 380 (CA10

1992) (district court may consider only the arguments and evidence before the administrator at the time it made that decision).

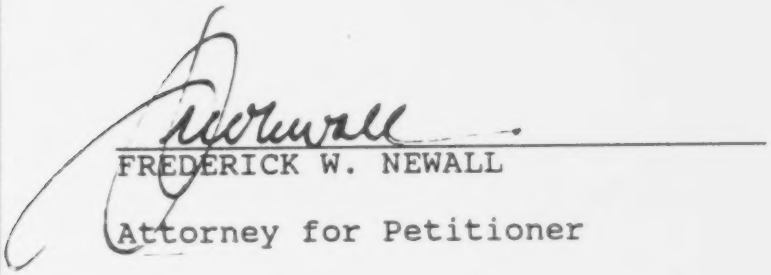
CONCLUSION

This Court should take the opportunity to clarify its holding in Bruch and in light of the conflicts between the circuits and the Tenth Circuit's opinion in this case. There needs to be a clarification of the perimeters of Bruch, and the extent to which an administrator's grant of discretion to set procedures may override the plain terms of the Plan language. Given the standards of review set forth in Bruch, this Court must grant certiorari in this case and reverse the Tenth Circuit's ruling

that Randall acted reasonably. Restricting or denying such fundamental ERISA rights as an application or a hearing should not go unanswered here.

DATED: September 3, 1993.

Respectfully submitted,



FREDERICK W. NEWALL

Attorney for Petitioner